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7 SAN BERNARDINO

8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

10 GALE SOSTEK; and HERB SOSTEK,  
11 Plaintiffs,  
12 vs.  
13 COUNTY OF SAN BERNARDINO;  
14 and DOES 1-10, inclusive,  
15 Defendants.

Case No. 5:23-cv-02236-MRA (MRWx)  
**EX-PARTE APPLICATION TO  
MODIFY SCHEDULING ORDER  
FOR PURPOSE OF HEARING  
DEFENDANTS' RENEWED  
MOTION TO STAY**

*[Filed concurrently with Declaration of  
Michelle R. Prescott in Support of Ex  
Parte Application]*

16 Trial Date: Januarv 28. 2025

17 DEFENDANTS, COUNTY OF SAN BERNARDINO and SAMUEL  
18 FULLER ("Defendants") hereby make this *ex parte* application for an order to modify  
19 the scheduling order to allow hearing on Defendants' renewed Motion to Stay after  
20 the motion cut off date of November 15, 2024.

21 *Ex parte* relief is warranted because without the Motion to Stay, the  
22 PLAINTIFFS HERB SOSTEK and GALE SOSTEK ("Plaintiffs") have indicated that  
23 they will weaponize Defendant Samuel Fuller's invocation of his Fifth Amendment  
24 right against self-incrimination, leaving the Defendants irreparably harmed and  
25 unable to properly defend Plaintiffs' claims in this lawsuit.

26 This application is based on this Notice, the accompanying Memorandum of  
27 Points and Authorities, Declaration of Michelle R. Prescott, exhibits attached thereto  
28

1 and other such evidence and argument that may be presented to the Court at the  
2 hearing of this application.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. INTRODUCTION AND FACTUAL BACKGROUND**

5 Defendants are seeking *ex parte* relief to modify the scheduling order to hear  
6 their renewed Motion to Stay after the current cut off of November 15, 2024.

7 This matter arises out of a use of force encounter between Defendants and  
8 DECEDENT KYLE SOSTEK ("Decedent") on March 12, 2023. Plaintiffs, as the  
9 Decedent's successors-in-interest filed their Complaint in this matter on October 3,  
10 2023 alleging violations of the Fourth and Fourteenth Amendments of the United  
11 States Constitution.

12 On April 3, 2024, Defendants moved to stay the proceedings on the grounds  
13 that the ongoing criminal investigation into Deputy Fuller by the California  
14 Department of Justice ("DOJ") would preclude Defendants from properly mounting  
15 a full and fair defense in this civil action. (Dkt. 39.)

16 On May 30, 2024, Defendants' Motion was denied. In denying the Motion the  
17 Court wrote:

18 "[I]f Fuller invokes the Fifth Amendment, as he intends, the Court may take  
19 measures to limit any prejudice and of his invocations and any adverse  
20 inferences drawn from such invocations. *See id.* (explaining that alternative  
21 procedures may protect the defendant under investigation from undue  
22 prejudice)." (Dkt. 46, p. 9.)

23 On September 18, 2024, Deputy Fuller's deposition was taken. Based on his  
24 attorneys' instructions, Deputy Fuller declined to answer questions about the subject  
25 incident and the events occurring before the incident as to his knowledge about the  
26 Decedent by invoking his Fifth Amendment right under the Constitution. (Declaration  
27 of Michelle R. Prescott ("Prescott Decl.") ¶ 3)

28 On October 14, 2024, additional documents were received from the DOJ

1 regarding this matter. (Prescott Decl. ¶ 4, **Exhibit A**)

2 The DOJ documents were produced after the discovery cut off. Defense counsel  
3 immediately sent them to Plaintiffs' counsel and asked to stipulate to be able to allow  
4 experts to rely on the documents. Plaintiffs' counsel has not agreed to allow the use  
5 of these documents. (Prescott Decl. ¶ 5)

6 After thoroughly reviewing these documents, Defendants decided to renew  
7 their motion to stay because it became clear that their defense in this matter would be  
8 hindered by Deputy Fuller's invocation of the Fifth Amendment and the speed of the  
9 DOJ's investigation of this incident. (Prescott Decl. ¶ 6)

10 On November 8, 2024, Defendants counsel attempted to meet and confer with  
11 Plaintiffs' counsel, but Plaintiffs' counsel was unable to meet and confer until  
12 November 13, 2024, necessitating this *ex parte* application (Prescott Decl. ¶ 7,  
13 **Exhibit B**)

14 **II. NOTICE TO OPPOSING COUNSEL**

15 On November 20, 2024 at approximately 4:00 p.m., Defendants' counsel  
16 reached out via telephone and sent an email to Plaintiff's Counsel regarding this *ex*  
17 *parte* application to inquire whether Plaintiff's counsel would stipulate. (Prescott Dec.  
18 ¶ 8) Plaintiff's counsel responded stating they would oppose.

19 Based on the Court's Standing Order, the Court does not typically set *ex parte*  
20 matters for hearing. Plaintiff's Counsel is:

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**III. DEFENDANTS' DEFENSE WOULD BE IRREPARABLY HARMED WITHOUT THE MOTION TO STAY**

Both Defendants would be irreparably harmed without a hearing on the Renewed Motion to Stay in these proceedings because without Deputy Fuller's testimony a full and fair defense for either Defendant is impossible. Only Deputy Fuller can explain what he knew and perceived about the subject incident. In order to understand the reasonableness of his actions it is imperative that he be able to testify about these facts. However, because the DOJ is actively investigating this matter, Deputy Fuller is left with an impossible choice between two horrible outcomes. He can ignore his attorneys' advice and waive his Fifth Amendment privilege, thereby risking a loss of personal liberties for any misstep in his testimony in his potential criminal case, or exercise his Constitutional right to invoke his Fifth Amendment privilege and risk financial ruin via punitive damages sought in the Plaintiffs' civil claim. Absent critical testimony from Deputy Fuller, Defendants are materially prejudiced and unable to adequately defend themselves in this action because the pending claims brought by Plaintiffs under the Fourth and Fourteenth Amendments necessarily require testimony from Deputy Fuller concerning his reasonable and objective beliefs about his safety and the threat posed by Decedent Sostek at the time of the lethal force encounter. Without Deputy Fuller's testimony, Defendants are irreparably harmed because they are unable to solicit testimony from Deputy Fuller to build their defense due to the ongoing DOJ investigation.

Further, Plaintiffs have expressed that they will use Deputy Fuller's lawful reliance on a Constitutional protection to inflict maximum prejudice upon both Defendants, asking the jury to infer Deputy Fuller's refusal to respond is an admission of wrongdoing. As Counsel stated at Deputy Fuller's deposition,

"I have to advise you that you have a right not to answer certain questions under the Fifth Amendment if you so choose, but I want to make sure you understand this could be brought to the attention to the judge or jury in your

1 civil case. And there could be an adverse inference instruction given to the  
2 jury that you didn't answer questions, and the jury can make of that what they  
3 want. But I just want to make sure you have a general understanding of that."

4 It is clear that Plaintiff intends to weaponize the California Department of  
5 Justice's search for justice in this matter by seeking an adverse inference instruction  
6 for the jury to view Deputy Fuller's invocation of the Fifth Amendment be viewed as  
7 an admission of wrong doing. This would be highly prejudicial to both Defendants  
8 and cause them irreparable harm which could only be prevented by a Stay in these  
9 proceedings.

10 **IV. THE COURT HAS DISCRETION TO MODIFY THE SCHEDULING**  
11 **ORDER AND GOOD CAUSE EXISTS TO DO SO**

12 "The decision to modify a scheduling order is within the broad discretion of the  
13 district court." *FMC Corp. v. Vendo Co.*, 196 F.Supp.2d 1023, 1030 (E.D. Cal. 2002).  
14 Federal Rule 16(b)(4) states that: "A schedule may be modified only for good cause  
15 and with the judge's consent." Fed.R.Civ.P. 16(b)(4). Rule 16(b)' s "good cause"  
16 standard primarily considers the diligence of the party seeking the amendment.  
17 *Johnson v. Mammoth Recreations, Inc.* (9th Cir. 1992) 975 F.2d 604, 609.

18 In this matter, good cause exists because of the recent developments in this  
19 litigation. On October 14, 2024, the DOJ produced documents from their  
20 investigation. (Prescott Decl. 4, **Exhibit A**) Valuable information that will allow for  
21 justice in this matter continues to be revealed as the DOJ investigation continues such  
22 that justice would best be served in this matter by allowing the investigation to  
23 conclude before allowing these proceedings to go to trial.

24 Additionally, in spite of Defendants best efforts, Defendants were unable to  
25 comply with Local Rule 7-3 that requires that the Parties meet and confer at least  
26 seven days before the filing of a motion due to Plaintiffs' Counsel's inability to meet  
27 and confer. (Prescott Decl. ¶ 7, **Exhibit B**) Therefore, Defendants are without fault  
28 for their inability to timely file their Renewed Motion to Stay in this matter.

**V. CONCLUSION**

For the aforementioned reasons, Defendants respectfully ask this Court to issue an order modifying the scheduling order for the purpose of hearing Defendants' Renewed Motion to Stay.

DATED: November 21, 2024      WESIERSKI & ZUREK LLP

By: \_\_\_\_\_



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